(1) Supreme Court, U.S.
FILED
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JEROME EVANS, AS WRONGFUL DEATH
BENEFICIARY OF LUCILLE EVANS,
Petitioner,

V.

SHAHZAD DAILAMI-POUR
Respondent.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 23, 2006

QUESTION PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in granting the Respondent's Motion to Dismiss Notice of Appeal due to a purported lack of jurisdiction.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the Fifth Circuit is Jerome Evans, deceased, and/or the Estate of Jerome Evans.

The Respondents here and in the United States Court of Appeals for the Fifth Circuit are Dr. Shahzad Dailami-Pour and the United States of America, by and through the Unites States Attorney for the Northern District of Mississippi, Jim M. Greenlee.

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IN THE SUPREME COURT OF THE UNITED STATES

JEROME EVANS, AS WRONGFUL DEATH BENEFICIARY OF LUCILLE EVANS, *Petitioner*

v.

SHAHZAD DAILAMI-POUR, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jerome Evans, by and through his attorney of record, Eduardo A. Flechas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment or opinion of the Court of Appeals (Appendix A, *infra*) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on May 26, 2006 (Appendix A, *infra)*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (2004).

STATEMENT OF THE CASE

On June 11, 2004, following several physical examinations by the Respondent, Dr. Shahzad Dailami-Pour (also referred to as "Dailami-Pour"), Lucille Evans, a middle-aged female and mother to the Petitioner, Jerome Evans (also referred to as "Evans"), suffered a massive heart attack and departed this life.

On November 18, 2004, Evans commenced a wrongful death action in the Circuit Court of Humphreys County, Mississippi, alleging that Dailami-Pour failed to properly diagnose and treat Lucille Evans, thereby

causing her death. Subsequently, on December 21, 2004, Evans obtained an entry of default and filed a Motion for Default Judgment.

On December 21, 2004, a Notice of Removal was filed by the United States Attorney for the Northern District of Mississippi on behalf of the United States of America (also referred to as the "United States") alleging that Dailami-Pour was a federal employee of the United States, thereby coming under the Federal Tort Claims Act, requiring removal, and requiring the substitution of the United States. In addition, on said date, the United States filed a Motion to Dismiss claiming that Evans failed to exhaust his administrative remedies and improperly sued Dailami-Pour.

In response, Evans filed a Motion to Remand, on December 28, 2004. Evans asserted in such motion that remand was proper in that Dailama-Pour was an independent contract and, therefore, not subject to the

protections of the Federal Tort Claims Act.

On or about August 12, 2005, Evans departed this life; counsel of record learned of Evans' death several weeks later. On October 17, 2005, a Petition for Letters of Administration was filed with the Chancery Court of Humphreys County, Mississippi by other counsel retained by Evans' surviving spouse, Pamela Evans. To date, no Letters of Administration have been issued by or filed with the subject Chancery Court.

On October 21, 2005, the United States District Court for the Northern District of Mississippi entered an Order granting the United States' Motion to Dismiss. In doing so, the District Court concluded that Evans failed to exhaust his administrative remedies prior to commencing his State action.

On November 18, 2005, Evans, by and through counsel of record, filed a Notice of Appeal; of great importance is the fact that no individual possesses

authority to act on behalf of Evans' estate in that Letters of Administration have not been issued. Subsequently, on January 3, 2006, Evans, by and through counsel of record, filed a Motion to Substitute Party, seeking to substitute Pamela Evans, as the proper appellant. On March 1, 2006, an Order was entered by the United States Court of Appeals for the Fifth Circuit denying said request for substitution.

The United States then filed a Motion to Dismiss Appellant's Notice of Appeal, on March 16, 2006. On May 26, 2006, the Court of Appeals entered an Order granting the subject Motion due to a purported lack of jurisdiction.

Evans now petitions this honorable Court for a writ of certiorari in order that a review may be conducted of the Court of Appeals' dismissal of Evans' Notice of Appeal.

REASONS FOR GRANTING THE PETITION

At the District Court and Court of Appeals levels, conflicting decisions are proliferating rapidly, and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is clearly erroneous, and the issues that it addresses are important.

I. Attorney of Record Authorized to File Notice of Appeal

> (2) *Before Notice of Appeal is Filed– Potential Appellant.* If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative– or, if there is no personal representative, the **decedent's attorney of record** – may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed,

> substitution must be in accordance With Rule 43(a)(1).

Fed. R. App. P. 43(a)(2) (emphasis added). Rule 43 of the Federal Rules of Appellate Procedure provides that a decedent's attorney of record may file a notice of appeal prior to the empowerment or certification of a personal representative. *Id.*

In the present case, Evans, the party entitled to appeal the subject order of dismissal, died prior to filing a notice of appeal; Evans departed this life intestate on August 12, 2005, while the subject Order of the United States District Court was entered on October 21, 2005. Although a Petition for Letters of Administration was filed in the Chancery Court of Humphreys County, Mississippi by Pamela Evans, surviving spouse of Evans, on October 17, 2005, with an Order Granting the Issuance of Letters of Administration being entered on October 27, 2005, no Letters of Administration have

been issued to date. (Appendix C, *infra*)

Pursuant to Mississippi law, the administrator of an intestate estate may not act with authority on behalf of an estate unless letters of administration have been issued by a Chancery Clerk. *See Grant v. Spann*, 34 Miss. 294 (1857); *Woods v. Ridley*, 27 Miss. 119 (1854); *McWilliams v. Hill*, 27 Miss. 44 (1854); *Edmunson v. Roberts*, 2 Miss. 322 (1836). The power and authority of an administrator are derived from the issuance of letters of administration. *Spann*, 34 Miss. at 36; *Woods*, 27 Miss. at 127; *McWilliams*, 27 Miss. at 46. Any act taken on behalf of an estate by a purported administrator without the actual issuance and/or receipt of letters of administration is deemed void. *Woods*, 27 Miss. at 127.

In the present action, Pamela Evans was merely granted permission to obtain letters of administration, and nothing more. The Chancery Court's Order

Granting the Issuance of Letters of Administration directed the Chancery Clerk to issue Letters of Administration, which to date has not been accomplished. (Appendix C, *infra)* As such, at the time of the filing of the subject Notice of Appeal, Evans did not have a duly empowered personal representative to act on his behalf.

In compliance with Fed. R. App. P. 43(a)(2), the Appellant's attorney of record, Eduardo A. Flechas, filed the Notice of Appeal in question on November 18, 2005. (Appendix B, *infra*) Thus, the decision of the Court of Appeals in granting Dailami-Pour's Motion to Dismiss Notice of Appeal is patently erroneous.

II. Fair Notice of Specific Individual or Entity Seeking to Appeal

In 1988, this Court decided the case of *Torres v.*

Oakland Scavenger Co., 487 U. S. 312 (1998). In *Torres*, this Court ruled that the language of Rule 3© requiring a notice of appeal to "specify the party or parties taking the appeal" was a jurisdictional requirement. *Torres*, 487 U.S. at 317. This Court also held in *Torres* that "mere technicalities" should not interfere with the consideration of a case, and that the specificity requirement of Rule 3© may be met by some designation that provides notice of the individual or entity seeking to appeal. *Id.* at 318.

Following the *Torres* decision, a significant amount of litigation occurred which involved the specificity requirements under Rule 3©. Thereafter, in 1993, Rule 3 was amended to provide that a notice of appeal must not be dismissed if it is objectively clear that a party or entity intended to appeal.

Pursuant to Rule 3© of the Federal Rules of Appellate Procedure, an appeal must not be dismissed

"for failure to name a party whose intent to appeal is otherwise clear from the notice". Fed. R. App. P. 3(c)(4). In addition, Rule 3 is to be liberally construed by the courts. *Smith v. Barry*, 502 U.S. 244 (1992).

In the instant case, a Notice of Appeal was filed by Evans and/or his estate, by and through counsel of record, in a timely manner. (Appendix B, *infra)* In that the subject Notice of Appeal was filed for or on behalf of Evans, said Notice of Appeal provided adequate and sufficient notice to Dailami-Pour of the identity of the appellant. Moreover, the subject Notice of Appeal provided sufficient and adequate notice of the appellant so as to allow the lower courts to determine with reasonable certitude the identity of the appellant for purposes of liability or sanctions. Accordingly, Evans' Notice of Appeal was sufficient so as to permit jurisdiction by the Court of Appeals.

Aside from being patently erroneous, the

decision of the Court of Appeals in granting Dailami-Pour's Motion to Dismiss Notice of Appeal represents yet another conflicting interpretation of the language and meaning of Rule 3 of the Federal Rules of Appellate Procedure. To date, the total number of cases involving differing or conflicting views as to the specificity required under Rule 3© are so numerous as to reasonably prohibit the citing of the same in this petition. The petition at hand furnishes this Court with the opportunity to provide guidance as to the specificity required under Rule 3©.

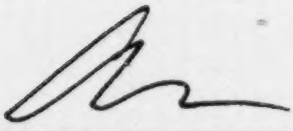
CONCLUSION

The United States Court of Appeals for the Fifth Circuit erroneously granted the Respondent's Motion to Dismiss Notice of Appeal. This is so in that the

Petitioner's attorney of record was permitted to file the subject Notice of Appeal due to the Petitioner's death prior to the filing of said Notice of Appeal and the lack of a duly qualified personal representative. The Court of Appeals' decision is also patently erroneous in that the Notice of Appeal in question provided fair notice of the specific individual or entity seeking appeal.

Aside from being clearly erroneous, the decision rendered by the Court of Appeals is in conflict with the various decisions rendered by other Circuits. As well, the issues presented for review by this Court are important to both the present Petitioner and other similarly situated individuals or estates. Therefore, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-61160

Decided May 26, 2006

Jerome Evans, as Wrongful Death Beneficiary of Lucille Evans	)
v.	)
Shahzad Dailami-Pour and the United States of America	)

Before REAVLEY, HIGGINBOTHAM, and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's motion to dismiss appeal for lack of jurisdiction is granted.

IT IS FURTHER ORDERED that the appellant's motion for all attorney's fees and costs associated with the defense with the defense of the subject motion is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CAUSE NO. 4:04CV392-D-B

SUBMITTED NOVEMBER 18, 2005

Jerome Evans, as Wrongful Death Beneficiary of Lucille Evans	)
	)
v.	)
	)
Shahzad Dailami-Pour, M.D.	)

Notice is hereby given that Jerome Evans, Plaintiff in the above-styled case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order Granting Motion to Dismiss and/or Final Judgment entered in this action on the 21st day of October, 2005.

/s/ Eduardo A. Flechas

APPENDIX C

CHANCERY COURT OF HUMPHREYS COUNTY MISSISSIPPI

CAUSE NO. E 2005-0178

Decided OCTOBER 27, 2005

In The Matter of the Estate of)
Jerome Evans, Deceased)

Order Granting the Issuance of Letters of Administration

This cause this day having come on for hearing upon the duly verified petition of PAMELA EVANS, and upon other pleadings and papers heretofore filed in this cause, praying for issuance of Letter of Administration in the matter of the Estate of

JEROME EVANS, Deceased, hereto filed in this Court. The Court after considering same doth hereby find the following:

That said decedent departed this life on August 12, 2005 in Silver City, Humphreys County, Mississippi and at the time of his death he was a resident of Silver City, Humphreys County, Mississippi. That his assets consist of personal property in the approximate amount of $1,000.00. That prior to decedent's death, he had filed a wrongful death suit on behalf of the Estate of LUCILLE EVANS, decedent's mother, for which the amount of proceeds are not known, if any. That Decedent owned a one-third (1/3rd) interest in some real property located at 2307 Richland Road, Silver City, Mississippi and has an interest in some real property inherited by decedent's mother, LUCILLE EVANS from her deceased mother, LUCILLE POOL,

located at 935 Logger Lake, Humphreys County Mississippi.

That at the time of decedent's death he was married to PAMELA EVANS, the petitioner and had three (3) children, (_____), (_____), and (_____). That JEROME EVANS, died intestate leaving as his only surviving heirs, his wife, PAMELA EVANS and his three (3) children, (_____), (_____), and (_____), all minors.

That decedent died without having executed a Will and no such instrument has been presented to this Court by any other party. That petitioner, PAMELA EVANS, is an adult resident citizen of Silver City, Humphreys County, Mississippi.

That said estate should be immediately administered for he proper management of said estate, an for funeral expanses incurred and for the collection of assets, if any, and for the payment of proper and legal claimants, if any. Petitioner has demonstrated that this estate should be administered and that she should be granted Letters of Administration.

That petitioner is above the age of twenty-one years, is competent and qualified in all other respects to serve as Administratrix of the Estate of JEROME EVANS, DECEASED.

That the Court finds that Letters of Administration for the Estate of JEROME EVANS, Deceased, should be granted unto petitioner upon her compliance with the requirements of law.

IT IS THEREFORE ORDERED, that the petitioner is hereby declared Administratrix of the above mentioned estate and the Clerk of this Court is Ordered, Authorized and Directed to Issue Letters of Administration to PAMELA EVANS, upon her entering statutory oaths and bond, in any.

ORDERED, ADJUDGED AND DECREED, on this the 27th day of October, A.D., 2005

/S/ Jane R. Weathersby
CHANCELLOR

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CAUSE NO. 4:04CV392-D-B

DECIDED OCTOBER 21, 2005

Jerome Evans, as Wrongful Death Beneficiary of Lucille Evans	)
	)
v.	)
	)
Shahzad Dailami-Pour, M.D.	)

ORDER GRANTING MOTION TO DISMISS

Pursuant to an opinion issued this day, it is hereby ORDERED that

(1) the United States' motion to dismiss (docket entry 5) is GRANTED;

(2) the Plaintiff's claims are DISMISSED; AND

(3) this case is CLOSED.

All memoranda and other materials considered by the court in ruling on this motion are hereby incorporated into and made a part of the record in this cause.

SO ORDERED, this the 21st day of October, 2005.

/s/ Glen H. Davidson
Chief Judge

APPENDIX E

FEDERAL RULE OF APPELLATE PROCEDURE 3

Appeal As Of Right – How Taken

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

*** This document has been excerpted for purposes of this appendix. Only the relevant portion of the document is reproduced.

APPENDIX F

FEDERAL RULE OF APPELLATE PROCEDURE 43

Substitution of Parties

(2) *Before Notice of Appeal Is Filed—Potential Appellant.* If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal

representative–or, if there is no personal representative, the decedent's attorney of record–may file a notice of appeal within the time prescribed by these rules. After the notice of appeal if filed, substitution must be in accordance with Rule 43(a)(1).

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SUPPLEMENT TO APPENDIX

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August 23, 2006

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CAUSE NO. 4:04CV392-D-B

DECIDED OCTOBER 21, 2005

Jerome Evans, as Wrongful Death Beneficiary of Lucille Evans	)
	)
v.	)
	)
Shahzad Dailami-Pour, M.D.	)

OPINION GRANTING MOTION TO DISMISS

Presently before the court is the United States' Motion to dismiss. Upon due consideration, the court

finds that the motion should be granted.

Factual and Procedural Background

The Plaintiff filed this wrongful death action in the Circuit Court of Humphreys County on November 18, 2004. In the complaint, the Plaintiff asserts that the Defendant Dr. Shahzad Dailami-Pour was negligent in his treatment of the Plaintiff's decedent, Lucille Evans, and provided a substandard level of medical care while treating her. The Defendant subsequently removed the case to this court pursuant to, *inter alia,* 28 U.S.C. § 2679(d)(2). The United States Attorney for the Northern District of Mississippi has certified that the Defendant Dr. Dailami-Pour was acting within the scope of his employment as a federal employee at the relevant time, and asserts that he should be dismissed from the suit with the United States being substituted as the proper

defendant.[1] See 28 U.S.C. §§ 2679 (b), 2679 (d). In the present motion, the United States now moves to dismiss the Plaintiff's claims based upon his failure to properly exhaust his administrative remedies under the

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[1]The Plaintiff has challenged the United States' certification of Dr. Dailami-Pour and has filed a motion to have this case remanded to state court. The court finds, however, that the Government's certification was proper and that, even if it were not, this court would retain jurisdiction over this case in any event. Garcia v. United States, 88 F.3d 318, 324 (5th Cir. 1996).

The court finds that the Government's certification was proper because 42 U.S.C. § 233(g)(1)(A) extends Federal Torts Claims Act coverage to contractor physicians such as Dr. Dailami-Pour when they are employed by nonprofit private entities that receive federal funds under 42 U.S.C. § 254b. Dr Daimler-Pour was indisputable employed as a contractor physician by the G.A. Carmichael Family Health Center, Inc., a nonprofit private entity in Belzoni, Mississippi, that receives federal funds under 42 U.S.C. § 254b. The court thus finds that the United States is properly substituted as the Defendant in this cause. Further, as noted below, the Plaintiff's sole remedy at law in this action is under the Federal Tort Claims Act, an avenue which remains open for him to pursue his claim.

Federal Tort Claims Act, 28 U.S.C. § 2675(a).

Discussion

The United States, as a sovereign, is immune from suit unless it consents to be sued. United States v. Mitchell, 455 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L. Ed. 2d 607 (1980). Thus, the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit. United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953-54, 47 L.Ed. 2d 114 (1976). As a result, consent "cannot be implied but must be unequivocally expressed." Mitchell, 445 U.S. at 538. Accordingly, statutes purporting to waive the United States' sovereign immunity are strictly construed. See id.

In various statutes throughout the years, congress has carved into the immunity of the federal government. One such statute is the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 1402 (b),

2401 (b) and 2671-80, which waives the United States' sovereign immunity with regard to various types of tort claims, including claims for personal injuries allegedly caused by the negligence of federal employees acting within the scope of their employment. See United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L. Ed. 2d 259 (1979). The FTCA, however, attaches conditions to the waiver. One of those conditions is contained in 28 U.S.C. § 2679(b)(1), which provides that the FTCA is a plaintiff's exclusive remedy in cases of this type:

> The remedy against the United States provided by [the Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action...against the employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(b)(1).

In addition to the FTCA being the exclusive remedy for claims of this type, another condition Congress has placed on the government's waiver os immunity is the exhaustion requirement contained in 28 U.S.C. § 2675(a), which provides that:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this action.11

28 U.S.C. § 2675(a). The FTCA also makes clear that its exhaustion requirements apply even to actions not originally brought against the United States. See 28 U.S.C. § 2679(d)(4) (actions in which the United States is substituted as a party "shall proceed in the same

manner as any action against the United States filed pursuant to ;the FTCA] and shall be subject to the limitations and exceptions applicable to those actions.")

Here, the Plaintiff has not complied with section 2675(a)'s exhaustion requirement because, although he filed a claim with the appropriate Federal agency, he failed to wait until the agency made a final disposition fo his claim or until six months had passed from the date the claim was filed, as is required by 28 U.S.C. § 2675(a) before a claim may be pursued in court.[2]

Conclusion

In sum, the court shall dismiss the Plaintiff's present complaint due to his failure to exhaust his

---

[2]After the Decedent passed away on June 11, 2004, the Plaintiff filed an administrative claim with the federal Department of Health and Human Services (HHS) on August 19, 2004; he then filed this suit in state court on November 18, 2004, some three months later, prior to either obtaining a written denial of his claim from HHS or waiting six months until February 19, 2005.

FTCA administrative remedies prior to filing this suit. The court specifically notes that the FTCA's two year statute of limitations on the Plaintiff's claim has not expired, and will not do so until June 11, 2006, thereby affording the Plaintiff an opportunity to properly exhaust his administrative remedies prior to that time and refile suit pursuant to the FTCA in this court if necessary. See *28* U.S.C. § 2401(b).

A separate order in accordance with this opinion shall issue this day.

This the 21st day of October 2005.

/s/ Glen H. Davidson
Chief Judge